72-995

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Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term 1972

No. 72-995

ROBERT THOMAS JENKINS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

FLYNN KIMERER THINNES & GALBRAITH
By John J. Flynn
Tom Galbraith
1950 First National Bank Plaza
100 West Washington Street
Phoenix, Arizona 85003
Attorneys for Petitioner

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IN THE

Supreme Court of the United States

October Term 1972

No.

ROBERT THOMAS JENKINS,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Robert Thomas Jenkins prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, affirming the judgment of conviction rendered by the United States District Court for the District of Arizona.

OPINION BELOW

The opinion of the Court of Appeals, not yet officially reported, is printed in the Appendix.

JURISDICTION

The judgment of the Court of Appeals was entered on November 20, 1972. A timely Petition for Rehearing was denied on December 14, 1972. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. May a conviction be sustained where the crimes charged were the product of the creative, even coercive, activity of a paid government agent?

2. Where there is ample evidence of entrapment by creative activity, is it proper for a trial judge to refuse to submit that issue to the jury?

3. Where by his activity, a government informant has created, participated in, and profited from the crimes charged, may the government nevertheless pay the informant a reward, conceal his identity from the defendant until shortly before trial, and then make only late, token efforts to secure his attendance at trial?

4. Where the government offers to provide immunity to a witness only if he will testify untruthfully to strengthen the government's case, is the trial court powerless to grant or compel immunity; so that the witness may testify on the defendant's behalf?

5. When after receiving confusing instructions and after eighteen hours of deliberations the jury asked whether it could "trade votes," did the trial court err in refusing to instruct the jurors that vote trading is improper and in refusing to declare a mistrial?

6. Where the credibility of the defendant is a vital issue and the government has failed to make a reasonable effort to secure the attendance of a crucial corroborating witness, is it error to refuse the defendant an opportunity to introduce the results of a polygraph examination to be taken by any polygraph operator chosen by the government?

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

21 U.S.C. § 841(a)(1)

(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally —

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or

21 U.S.C. § 846

Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

21 U.S.C. § 952(a)

(a) It shall be unlawful to import into the customs territory of the United States from any place outside thereof (but within the United States), or to import into the United Sates from any place ouside thereof, any controlled substance in schedule I or II of subchapter I of this chapter, or any narcotic drug in schedule III, IV of V of subchapter I of this chapter, except that —

21 U.S.C. § 960(a)(1)

(a) Any person who —

(1) contrary to section 952, 953, or 957 of this title, knowingly or intentionally imports or exports a controlled substance.

21 U.S.C. § 963

Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both which may not exceed the maximum punishment prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

18 U.S.C. § 6002
§ 6002. Immunity generally

Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to —

(1) a court or grand jury of the United States,

(2) an agency of the United States, or

(3) either House of Congress, a joint committee of the two Houses, or a committee or a subcommittee of either House,

and the person presiding over the proceeding communicates to the witness an order issued under this part, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

Added Pub.L. 91-452, Title II, § 201(a), Oct. 15, 1970, 84 Stat. 927.

18 U.S.C. § 6003
§ 6003. Court and grand jury proceedings

(a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to a court of the United States or a grand jury of the United States, the United States district court for the judicial district in which the proceeding is or may be held shall issue, in accordance with subsection (b) of this section, upon the request of the United States attorney for such district, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section 6002 of this part.

(b) A United States attorney may, with the approval of the

Attorney General, the Deputy Attorney General, or any designated Assistant Attorney General, request an order under subsection (a) of this section when in his judgment —

(1) the testimony or other information from such individual may be necessary to the public interest; and

(2) such individual has refused or is likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination.

Added Pub.L. 91-452, Title II, § 201(a), Oct. 15, 1970, 84 Stat. 927.

Fifth Amendment of the United States Constitution

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment of the United States Constitution

In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

STATEMENT

After four days' deliberation, two requests for reinstruction, and asking whether a juror could "trade votes" (TR 1575, 1588,

1593), a jury convicted Robert T. Jenkins of possessing marijuana and conspiring to import marijuana, while acquitting him of charges of conspiring to possess marijuana and importation (TR 1604). The government's chief witness was Johnny Jay McDaniels, who was arrested with Jenkins near 430 pounds of marijuana at the airport in Winslow, Arizona.

In exchange for dropping three felony charges and a promise to recommend probation, McDaniels testified that Jenkins introduced him to George Bustamonte, a Mexican National, in Hermosillo, Sonora on June 24, 1971. McDaniels and Bustamonte flew a small Mexican airplane loaded with marijuana to Winslow, Arizona (TR 283, 288). On this trip, Bustamonte taught McDaniels the proper route to follow in carrying contraband; later, he provided special training to McDaniels on landing in short distances (TR 455), and supplied intelligence about means of avoiding border patrol aircraft (TR 387). McDaniels testified that he subsequently made three solo flights importing marijuana purchased by Jenkins from Bustamonte.

Before the first flight, Bustamonte had McDaniels photographed at his ranch from numerous angles (TR 650). When, after the first trip, McDaniels declined to fly another load of marijuana to the United State, Bustamonte threatened to turn him and his airplane over to the Mexican government for a $10,000 reward (TR 469). After that Bustamonte telephoned McDaniels as often as "four or five times in one day," threatening to "finish off" McDaniels or turn him in with the photographs if he did not return to Mexico to undertake another importation (TR 617-8). Under this pressure McDaniels continued to work.

McDaniels made his final flight into Mexico for the sole purpose of selling an airplane (TR 635), with no desire to deal in marijuana (TR 658). Once in Hermosillo, however, McDaniels was held by Bustamonte "literally in captivity" (TR 657) and threatened with death on three separate occasions if he failed to transport another load of marijuana (TR 386-7, 654, 548-9). McDaniels testified that he undertook the flight that resulted in

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the arrests only because Bustamonte had threatened him (TR 658-9).

In his bill of particulars (R 10-13), filed October 1, 1971, Robert T. Jenkins had inquired whether an informant was used in the preparation of his case and if so, whether the informant had participated in the alleged offenses. Despite a statement by the trial court that the defendant would be entitled to know the identity of the informant if he had been a participant (TR 6), the government — fully aware of Bustamonte's activities — declined to answer that question (TR 4, 11).

On January 24, two weeks before trial, the government disclosed that George Bustamonte was in fact its informant (R 55). On a hearing of the defendant's motion to produce the informant, it was learned that George Bustamonte was a Mexican Customs Agent who had worked closely for more than a year with the United States Government (TR 753, 35, 1345), providing information about fifteen to twenty smuggling cases (TR 43) in exchange for compensation from the United States Government (TR 1346). For the Jenkins arrest, Bustamonte was immediately paid $300 (TR 755) and was sent an additional $1,200 under a code name, through the American Embassy in Mexico City (TR 755, 1349), a full twelve days after the government had knowledge, through McDaniels, of the full extent of Bustamonte's participation in the smuggling operation (TR 38, 42, 748-49).

Despite the fact that Customs Agent Hatch knew that it would take considerable time to locate Bustamonte, and believed that Bustamonte would be willing to testify (TR 48), the government did not begin to seek him until the day before the defendant's motion to produce the informant was heard, one week before trial. The full extent of the government's efforts to locate Bustamonte was to include his name in its computer border check list and to make a few telephone calls to his employer and family members (TR 757).

McDaniels testified that once marijuana was delivered to Wins-

low, he and Jenkins conveyed it to Lanny Witt. To rebut this testimony, the defendant called Lanny Witt, but Mr. Witt invoked the Fifth Amendment concerning his relationship with Johnny McDaniels (TR 786). Attorneys for Robert Jenkins made an offer of proof, based upon Witt's prior discussions with them, that if given immunity, Lanny Witt's testimony would exonerate the defendant Jenkins while showing substantial narcotics' dealings between Witt and McDaniels (TR 786-89). In chambers, Lanny Witt further testified, without contradiction, that the government had agreed to give him immunity but only on the condition that he testify to certain "facts" sought by the government. The defendant Jenkins sought either for the court to grant immunity to Lanny Witt or to compel the government to grant immunity. Neither effort was successful (TR 789, 793).

The trial court's instructions on reasonable doubt were lengthy and interspersed with other instructions (TR 1543-44, 1545, 1549). Parts of the instruction equate reasonable doubt that jurors would act on, rather than that which would cause hesitation (TR 1544). The jurors were asked to consider the strong possibilities of the case (TR 1544, 1579), and told that if the evidence was balanced, they should find innocence (TR 1545). On the afternoon of the second day of deliberations, the jurors asked to be reinstructed on the standards which should be applied in evaluating the evidence (TR 1575). After a second reading of the reasonable doubt instructions (TR 1579-1578), one juror asked the court again what was meant by the term "reasonable doubt" (TR 1587); once again the court repeated the substance of its instruction (TR 1588). The next morning the court was reconvened (TR 1592) to consider the following note from the foreman:

> "Your Honor a juror has offered to change his/her decision on one of the counts, even though he/she has stated that he/she believes the opposite way. This is offered in exchange for an agreement of his/her decision on the other three counts. (R 134)"

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The court declined to tell the jurors that they could not trade votes; instead, it simply repeated a portion of its instructions (TR 1595-98). The defendant objected to this procedure (TR 1594) and moved for a mistrial (TR 1953-94).

Prior to trial, defendant submitted the results of a polygraph examination corroborating his plea of innocence, and asked to be permitted to introduce the results of the polygraph examination taken by any operator of the government's choice. This request was denied (TR 77).

REASONS FOR GRANTING THE WRIT

I. *Certiorari Should Be Granted in Order to Resolve Conflicting Decisions About the Application of the Doctrine of Creative Activiy.*

The Ninth and Fifth Circuits have recently held the government may not obtain convictions where its agents have urged defendants to commit an offense and have supplied materials necessary to the commission of the offense regardless of whether there is criminal predisposition on the part of the defendant. *United States v. Bueno,* 447 F.2d 983 (5th Cir. 1971); *Green v. United States,* 454 F.2d 783 (9th Cir. 1971); *United States v. Russell,* 495 F.2d 671 (9th Cir. 1972). This Court has recently agreed to review the creative activity rule by granting certiorari in *Russell, supra,* U.S. Supreme Court No. 71-1585, 10/17/72, 41 L.W. 3207. The present case presents two significant questions about the nature of the creative activity rule.

A. *The Trial Court Erred In Refusing To Submit The Question Of Entrapment By Creative Activity To the Jury.*

There is a split in the circuits on this question. *Greene v. United States,* 454 F.2d 783 (9th Cir. 1971) concludes that creative activity is a question of law for the judge. The Fifth Circuit, conceptionalizing the creative activity as a form of entrapment, holds that whether the government has engaged in creative activity should be submitted to the jury. *United States v. Bueno,* 447 F.2d

983 (5th Cir. 1971). Of the two approaches, that taken in *Bueno, supra,* is the more farsighted. The Court in *Greene* was repelled by the specific facts before it, and did not attempt to generalize beyond that particular fact situation. Experience has shown, however, that the production of a crime by the government occurs with sufficient frequency to require that the formulation of a legal doctrine for such situations. The formulation adopted by the court in *Bueno* satisfies this need by setting forth the elements of entrapment by creative activity in such a way that factual questions about the government's activities may be submitted to the jury as is required by the Sixth Amendment of the United States Constitution. The defendant sought this treatment in his third requested instruction (see Appendix), but the instruction was not allowed (TR 1396).

B. *The Government Should Not Be Permitted To Obtain Benefit From Its Creation Of Illegal Activity.*

The Court of Appeals below disposed of the creative activity issue by stating that although such a defense may have been available to McDaniels, as the victim of Bustamonte's threats, it was unavailable to his co-defendant, Jenkins. In taking this position, the Court relied on *United States v. Sanchez,* 440 F.2d 649 (9th Cir. 1971), a classic entrapment case. The Court thus creates a conflict with its earlier decision in *Green v. United States,* 454 F.2d 783 (9th Cir. 1971).

In *Greene,* all convictions tainted by the government's creative activity were reversed, even though some of the defendants had little or no contact with the government agents who were responsible for the production of the crime. This is conceptually sound. In classical entrapment, as in *Sanchez,* the legal issue is whether the individual defendant lacked criminal predisposition before enticement by the government. In entrapment by creative activity, the concern is not with the mind of the accused, but rather with the moral quality of the government's acts. The concern, then, is the same which is prompted by the adoption of the "fruit of the poisonous tree" rule extension of the exclusionary rule. *Silver-*

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thorne Lumber Company v. United States, 251 U.S. 385, 50 S.Ct. Rptr. 182, 64 L.Ed. 319 (1920). This conviction must be reversed in order to deprive the government of incentive to engage in creative activity.

II. *Certiorari Should Be Granted In Order To Define The Positive Nature of The Government's Obligation To Make Participating Informants Available At Trial.*

With *Rovaraio v. United States,* 53 U.S. 53, 60-62, 77 S.Ct. 623, 627-28, 1 L.Ed.2d 639, 644-46 (1957), this Court established the rule that an informant's identity must be disclosed whenever it is relevant to the defense of an accused or essential to a fair determination of a case. This decision has been interpreted in the Court of Appeals to require the disclosure of any participating informant, *United States v. Lopez-Hernandez,* 394 F.2d 820 (9th Cir. 1968), and to require the government to make available its informants at trial if the government has any way encouraged the informant to be unavailable for subpoena. *Velarde-Villareal v. United States,* 354 F.2d 9 (9th Cir. 1965).

In this case, despite a timely request, after having provided funds to the informant in Mexico, the government hid the fact of his participation from the defendant until shortly before trial, at which time the government made a cursory, superficial effort to locate the informant. There is no support in the record for the trial court's conclusion that these attempts were "reasonable." Instead, as in *Hernandez v. Nelson,* U.S.D.C., N.D.Cal (1968) 298 F. Supp. 682, the efforts to find the informant were delayed to such an extent that they must be considered illusory.

III. *Certiorari Should Be Granted To Consider Whether Immunity May Be Obtained For a Defense Witness In Order To Rebut The Testimony Of a Government Witness Testifying Under a Grant Of Immunity And To Rectify The Court of Appeals' Failure to Follow Santobello v. New York.*

In *Earl v. United States,* 361 F.2d 531 (D.C. Cir. 1966), when confronted with an application for immunity on behalf of a de-

fense witness, the Court declined to grant immunity, but said in a footnote:

> "We might have quite different and more difficult problems had the government in this case secured testimony from one of the eyewitnesses by granting him immunity while declining to seek an immunity grant for Scott [the defense witness] to free him from possible incrimination to testify for Earl. That situation would vividly dramatize an argument on behalf of Earle that the *statute* as applied denied him due process." *Earl, supra,* at 534.

This case presents the problem which troubled the Court in *Earl.* McDaniels, by plea bargain, was granted immunity on three charges in exchange for his testimony against Robert Jenkins. On the critical issue of intent to distribute, McDaniels testified as an eyewitness that Jenkins distributed marijuana to Lanny Witt. When Mr. Witt refused to testify as the government wanted, the government refused to grant and the trial court refused to order immunity.

The Court of Appeals avoided facing the due process problem inherent in the government's ability to selectively decline or grant immunity to witnesses depending upon the content of their testimony, by an overly fine distinction. There was a difference, the court held, because McDaniels had obtained his immunity by plea bargaining rather than pursuant to 18 U.S.C. 6002 and 6003. The distinction is entirely artificial. *Santobello v. New York,* 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971) makes a plea bargain immunity specifically enforceable, and thus provides security to the witness equal to that obtainable pursuant to statute.

IV. *Certiorari Should Be Granted To Establish The Obligation Of a Trial Judge To Clearly Instruct The Jury And To Terminate Deliberation When From the Jury's Questions, It is Apparent That The Jury Is Hopelessly Confused.*

The trial court erroneously defined reasonable doubt as a doubt upon which members of the jury would be willing to act. *Holland v. United States,* 348 U.S. 121, 78 S.Ct. 127, 99 L.Ed. 150

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(1954). It compounded the confusion by informing the jury that it must consider strong probabilities of the case and find innocence if the evidence were balanced. Presumption of innocence, the jury was told, is good only until "outweighed by evidence to the contrary" (TR 1549, 1583). It is not surprising that members of the jury twice requested reinstruction on reasonable doubt only to be reread the same confusing instructions. The jury's total confusion concerning its function is apparent in the request to be instructed whether vote trading was permissible and, finally, in the jury's inconsistent verdicts. Having failed to provide clear instruction, the trial court should have either rectified this error or declared a mistrial.

V. *Certiorari Should Be Granted In Order To Consider Whether The Technology of Polygraph Examinations has Advanced to a Point Where the Results Of Such Examinations Should Be Admissible In Federal Court.*

This Court has never considered the issue of whether polygraph examinations may be admissible, but the decisions of the Court of Appeals since *Frye v. United States,* 293 F. 1013 (D.C. Cir. 1923) have been unanimous in refusing to admit such evidence. As the accuracy of the polygraph has progressed, this rule has drawn increasing criticism. *Polygraph Revisited: In Argument for Admissibility, Crim. Bull.* 6.63 Mr. 70; 4 *Suffolk L. Rev.* 111 (1969); *Imbau & Reid; The Lie Detector Technique: A Reliable and Valuable Investigative Aid;* 50 *ABAJ* 470 (1964); *Beck, Reliability of Psychiatric Diagnosis:* 1 *Critique of Systematic Studies,* 199 Am.Jur. *Psychiat.* 210, 212 (1963); *The Reliability of Polygraph Examiner Diagnosis of Truth and Deception, Corvith & Reid,* 62 *Journal of Criminal Law, Criminology and Police Science,* 276 (1971); *McCormick, Evidence,* § 174 at 372 (3 Ed. 1954). Following this criticism, the first departures from the rule of *Frye* have recently occurred in the two separate District Court cases of *United States v. Ridling,* 10/6/72 (U.S. D.Ct. Mich.), 12 Crim. L. Rptr. 2055 and *United States v. Zeiger,*

10/10/72, (D.C. 10 Crim. L. Rptr. 2057). Both cases permit the introduction of polygraph results over prosecutorial objection. The polygraph issue is thus ripening for a decision by this Court. The present case is one in which need for a polygraph is particularly pressing, due to the unavailibility of George Bustamonte and Lanny Witt to corroborate the defendant's contradictions of the government's witness, Johnny J. McDaniels.

CONCLUSION

For the foregoing reasons a petition for a writ of certiorari should be granted.

Respectfully submitted,
FLYNN KIMERER THINNES & GALBRAITH
By John J. Flynn
Tom Galbraith
Attorneys for Petitioner

January 1973

APPENDIX

United States Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

vs.

ROBERT THOMAS JENKINS,
Defendant-Appellant.

No. 72-2080

[November 20, 1972]
Appeal from the United States District Court
for the District of Arizona

Before: WRIGHT and GOODWIN, Circuit Judges, and McGOVERN, District Judge.*

GOODWIN, Judge:

Robert Thomas Jenkins, a member of the Arizona bar, was apprehended in the act of loading 430 pounds of marijuana into a friend's pickup truck at the Winslow, Arizona airport. He appeals the resulting convictions of conspiracy to import and illegal possession under 21 U.S.C. §§ 841(a)(1), 952(a), and 960(a)(1).

Jenkins asserts five major points, but none requires reversal.

Conceding that the entrapment defense is not available in its classic form, Jenkins nonetheless asserts that "an intolerable degree of government participation" in the crime renders his conviction void. He attempts to bring himself within the language

*The Honorable Walter T. McGovern, United States District Judge for the Western District of Washington, sitting by designation.

of *United States v. Russell,* 459 F.2d 671 (9th Cir. 1972), *cert. granted,* 41 U.S.L.W. 3207 (U.S. Oct. 17, 1972), and *Greene v. United States,* 454 F.2d 783 (9th Cir. 1971).

There was no direct governmental participation in Jenkins' criminal activities. In return for a cash reward, a smuggler named Bustamonte, who operated within Mexican territory, reported to United States officials a flight containing contraband. As a result of this information, officers were present when Jenkins played his part at the Winslow airport. Even if Bustamonte's cooperation with federal agents made him an agent, there was no evidence that he had ever induced Jenkins to participate in a smuggling venture. Bustamonte's dealings were with the pilot of the airplane, McDaniel. One who is not induced by government agents to participate in a crime may not rely upon the entrapment defense that might, in appropriate circumstances, be available to a colleague whose participation may have been induced by improper governmental activity. *United States v. Sanchez,* 440 F.2d 649 (9th Cir. 1971). We express no opinion in this case upon the question whether an entrapment defense might have been available to McDaniel. That issue is not before us.

Jenkins' next point is that the government's case is fatally tainted by the failure of the government to produce Bustamonte as a witness at the trial. While it is not plausible that Bustamonte's testimony could have helped Jenkins, we do not base our decision on the materiality of the hypothetical testimony. The most that Jenkins had a right to demand of the government was that it make a reasonable effort to locate and produce Bustamonte as a witness. The government had, after all, sent money to Bustamonte at a Mexican mail address. However, there is no showing that the government did not make a reasonable effort to locate Bustamonte, and, indeed, the district court found that it did make such an effort.

Jenkins also urges that the government or the trial court should have granted immunity to a witness named Lanny Witt.

Witt refused on Fifth Amendment grounds to talk about the case at all, and was not used as a witness for or against Jenkins. Jenkins recognizes that the cases have uniformly held that the trial court has no power to grant immunity to a witness whose testimony the defendant may wish to offer, and that the government cannot be forced to grant such immunity. *Ellis v. United States,* 416 F.2d 791 (D.C. Cir. 1969); *Earl v. United States,* 361 F.2d 531 (D.C. Cir. 1966), *cert. denied,* 388 U.S. 921 (1967). He hopes to avoid this rule through reliance on a footnote in *Earl* which stated that if the government granted immunity to its witnesses while refusing to do so for the defendant's witnesses an argument could be made that the "[g]overnment could not use the immunity statute for its advantage unless Congress made the same mechanism available to the accused." 361 F.2d at 534 n.1. However, on the facts of this case, that problem is not presented, for the government granted immunity to no one.

Nevertheless, Jenkins argues that because McDaniel, the pilot who transported the marijuana, negotiated a successful plea bargain McDaniel had nothing more to fear, and thus had the equivalent of immunity. The *Earl* case rejected the argument that a plea of guilty was the equivalent of a grant of immunity, and we agree.

Jenkins privately took a polygraph test to bolster his explanation of his part in the transaction. After an encouraging dry run, or experiment, with the polygraph, he offered to stipulate to take another test, given by an operator chosen by the government, and to have both tests reported to the jury. The government understandably refused so to stipulate, and the trial court correctly rejected the offer of Jenkins' electrical oath-helper. *United States v. Salazar-Gaeta,* 447 F.2d 468 (9th Cir. 1971); *United States v. Sadrzadeh,* 440 F.2d 389 (9th Cir. 1971), *cert. denied,* 404 U.S. 850 (1971).

Finally, Jenkins assigns numerous errors to the instructions. Jenkins did not object to the instructions, as required by Fed. R. Crim. P. 30. Not only were the alleged errors far from plain, but

the instructions as a whole fully and fairly explained to the jury the meaning of reasonable doubt.

Affirmed.

DEFENDANT'S REQUESTED INSTRUCTION NO. 1

Ladies and Gentlemen of the Jury, the defense of entrapment has been asserted by the defendant. If it appears that officers of the law or their agents incited, induced, instigated or lured the accused into committing an offense which he otherwise would not have committed and had no intention of committing, and if a criminal design or intent to commit the offense originates in the mind of one who seeks to entrap the accused and who lures him into the commission merely for the purpose of arresting and prosecuting him, the defense of unlawful entrapment would be a good defense, and the jury should acquit the accused.

People v. Strong, 21 Ill. 2d 320, 172 N.E.2d 765.

DEFENDANT'S REQUESTED INSTRUCTION NO. 2

A crucial element of defense of entrapment is that intent to commit crime must not arise in mind of accused, and burden is on prosecution to prove that intent originated with accused.

State v. Boccelli, 105 Ariz. 495, 467 P.2d 740 (1970).

DEFENDANT'S REQUESTED INSTRUCTION NO. 3

In order for the defense of entrapment to be found, criminal conduct must be the product of the creative activity of law enforcement officials. Creative activity by the Government may not consist of the elements of entrapment per se. It is sufficient, for the purposes of the entrapment defense, to find that the Government, through its agents, became involved directly and continuously over a period of time in the creation and maintenance of the criminal operation, thereby promoting and perpetuating the defendant's criminal conduct.

Greene v. United States, United States Court of Appeals for the Ninth Circuit (November 23, 1971).

United States Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA, Appellee, v. ROBERT THOMAS JENKINS, Appellant.	No. 72-2080

Appeal from the United States District Court for the District of Arizona.

Before: WRIGHT and GOODWIN, Circuit Judges, and McGOVERN, District Judge.*

ORDER

Appellant's petition for rehearing, filed December 4, 1972, is DENIED.

*The Honorable Walter T. McGovern, United States District Judge for the Western District of Washington, sitting by designation.

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-995

ROBERT THOMAS JENKINS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is reported at 470 F. 2d 1061.

JURISDICTION

The judgment of the court of appeals was entered on November 20, 1972. A timely petition for rehearing was denied on December 14, 1972 (Pet. App. 5a). The petition for a writ of certiorari was not filed until January 15, 1973, and is out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether under the circumstances of this case the trial court erred in not submitting an entrapment instruction to the jury.

2. Whether the finding of the district court that the government had made reasonable efforts to produce an informant as a witness at trial was clearly erroneous.

3. Whether the trial court properly refused to grant immunity to a potential defense witness.

4. Whether the trial court properly instructed the jury on the reasonable doubt standard.

5. Whether the trial court erred in refusing to admit into evidence the results of petitioner's polygraph test.

STATEMENT

Following a jury trial in the United States District Court for the District of Arizona, petitioner was convicted of conspiring to import marijuana, in violation of 21 U.S.C. 952(a), 960(a)(1) and 953 (Count 1) and of possessing marijuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1) (Count IV). He received consecutive sentences of five years' imprisonment on Count I and two years' imprisonment on Count IV. The court of appeals affirmed (Pet. App. 1a-4a).

On June 22, 1971, petitioner, an attorney, made a telephone call from Winslow, Arizona, to one Johnnie McDaniel,[1] who had previously worked for petitioner in a lumber business and occasionally used his professional

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[1]Johnnie McDaniel ultimately pleaded guilty to Count I of the indictment (the conspiracy count), and later became the principal witness against petitioner at trial.

services (Tr. 265-266). Petitioner asked McDaniel if he wanted to make some money and suggested that he accompany petitioner on a trip to Mexico in order to meet some men who "dealt with him" (Tr. 266-268). On June 24, 1971, petitioner and McDaniel flew to Hermosillo, Mexico (Tr. 274). During the flight petitioner informed McDaniel that they were going to meet some people involved in smuggling narcotics and proposed that the two of them should split the profits from all transactions. Petitioner also promised to supply an airplane for McDaniel, a trained pilot, to be used to transport loads of marijuana from Hermosillo to Winslow (Tr. 275-276). On June 25, 1971, at a meeting in Hermosillo with George Bustamante—a Mexican customs official, sometime smuggler, and (unknown to petitioner) occasional informant for the United States government—it was agreed that Bustamante would provide a plane to be used in transporting a load of marijuana to Winslow (Tr. 276-282). The delivery was made as planned.

On August 21, 1971, after two additional loads of marijuana were smuggled into the United States pursuant to petitioner's plan, petitioner and McDaniel met with Bustamante and one Arnaldo Fontes in Hermosillo. McDaniel testified that he made this trip to Mexico because Bustamante had told him that otherwise he would "finish him off" or turn over incriminating photographs of him to the "Federales" (Tr. 617-618). Similar threats were made to McDaniel when he expressed reluctance to make one of the preceding trips (Tr. 298, 305-306). At the meeting in Hermosillo, Fontes gave petitioner the down payment for a newly purchased plane, which petitioner had purchased in Phoenix for his Mexican contacts. Petitioner paid Fontes for a new load of marijuana, then returned to Winslow (Tr. 369-378). McDaniel remained in Hermosillo until August 26, 1971 (Tr. 379-381).

He testified that during the period of August 22 through August 25 Bustamante threatened to kill him if he did not cooperate (Tr. 385-387). He also testified that before he left with the new load on August 26, Bustamante warned him not to land in Winslow since the authorities would be waiting for him there (Tr. 387-388). Ignoring this advice, McDaniel decided to fly the load to Winslow (Tr. 391-393). After finding petitioner, the two men drove to pick up the marijuana, which was dropped from the plane and was hidden behind some bushes (Tr. 392, 408-409). While they were loading the marijuana onto a truck, federal customs agents appeared and arrested them (Tr. 410-411, 708). Petitioner told the arresting officers "If you let me go, I can lead you to bigger fish" (Tr. 711). The marijuana recovered by federal agents at that time weighed 430 pounds (and was the basis for Count IV, the possession charge on which petitioner was convicted).

ARGUMENT

1. Petitioner contends that the trial court erred in refusing to submit to the jury an instruction on entrapment because of "creative activity" by the government. The district court, however, was not required to submit to the jury an entrapment instruction, either in its classic form or in accord with some formulation about "creative activity." The evidence at trial showing that petitioner was ready, willing and able to carry out smuggling operations was overwhelming (and petitioner does not argue to

the contrary).[2] The cases on which petitioner relies, as he acknowledges, stand for the proposition only that "the government may not obtain convictions *where its agents have urged defendants* to commit an offense and have *supplied materials necessary* to the commission of the offense regardless of whether there is criminal predisposition on the part of the defendant" (Pet. 9, emphasis added).

Here—even assuming that Bustamante can be considered a "government agent" for these purposes—it is not alleged that Bustamante had "urged" petitioner (as distinguished from McDaniel) to smuggle marijuana and, indeed, the evidence shows that it was petitioner who urged others to participate in the conspiracy. Nor is it alleged that the government was actually the source of the contraband. The record indicates that Bustamante was an occasional informant, rather than an undercover agent, and that here he first informed federal agents of the activities of petitioner's group only after the conspiracy had been planned, and after at least one or two substantive offenses

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[2]Petitioner thus does not claim that he was "entrapped" according to the doctrine of this Court that entrapment occurs when the government implants a criminal predisposition in the mind of the accused. *Sorrells* v. *United States*, 287 U.S. 435; *Sherman* v. *United States*, 356 U.S. 369. Moreover, at trial petitioner denied any involvement whatever in marijuana traffic (Tr. 951). The trial court's refusal to give the instruction was, therefore, proper in view of the rule that one who denies committing the offense may not plead entrapment. *United States* v. *Mehciz*, 437 F. 2d 145 (C.A. 9), certiorari denied, 402 U.S. 974; *Harris* v. *United States*, 400 F. 2d 264, 266 (C.A. 5); *Ware* v. *United States*, 259 F. 2d 442, 445 (C.A. 8); *United States* v. *Georgiou*, 333 F. 2d 440 (C.A. 7), certiorari denied, 379 U.S. 901; *United States* v. *Freeman*, 412 F. 2d 1181, 1183 (C.A. 10). Contra: *Hansford* v. *United States*, 303 F. 2d 219, 221 (C.A.D.C., *en banc*). Whether the defense is the traditional entrapment test or one based on "creative activity," as petitioner would have it, there is no rational basis to distinguish between the two defenses in regard to the permissibility of inconsistent pleadings.

had been committed.[3] The customs agent who was in contact with Bustamante testified that when he was first contacted by Bustamante he was told generally that petitioner and McDaniel were flying marijuana from Mexico into the United States. On approximately August 22, 1971, prior to the last shipment to which the substantive count at issue relates, Bustamante telephoned the undercover agent and told him that petitioner was in Hermosillo waiting for a load of marijuana (Tr. 32-36). On August 26, the day of the arrest, Bustamante informed the customs agent by telephone that McDaniel was flying a load and would land it on a dry lake bed just northwest of Winslow (Tr. 37). The agent testified further that he did nothing to "set up" petitioner or McDaniel or to provide the marijuana or make any arrangements whatever regarding smuggling activities in Mexico (Tr. 762-763). Bustamante merely provided him with information about the activities of petitioner and McDaniel (Tr. 764-765).

Although Bustamante did provide assistance in smuggling the marijuana into the United States, the law is settled that this kind of participation does not absolve knowing and willing participants, such as petitioner, from

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[3]Petitioner's criminal activities up to this point would justify his conviction for conspiracy (Count I), even under the new entrapment defense upon which he relies, regardless of the effect that the subsequent activities of the informant might have on the substantive count here (Count IV). See *United States* v. *McGrath*, 468 F.2d 1027, 1031 (C.A. 7), petition for certiorari pending (No. 72-761); *United States* v. *Chisum*, 312 F. Supp. 1307, 1312 (C.D. Calif.); cf. *United States* v. *Basey*, 468 F. 2d 194, 195-196 (C.A. 9), petition for certiorari pending (No. 72-786). But, since petitioner received a two year sentence on Count IV to run consecutively with the five year sentence he received on Count I, this is not a case where the concurrent sentence doctrine would be appropriate.

criminal responsibility. See *e.g., United States* v. *Milisci,* 465 F. 2d 700 (C.A. 5), certiorari denied, March 19, 1973 (Nos. 72-5865 and 72-5828); *United States* v. *Ortega,* C.A. 2, Nos. 72-1479, 72-1482, decided December 11, 1972, petitions for certiorari pending (Nos. 72-1098 and 72-1103). The case is thus plainly distinguishable from *United States* v. *Russell,* 459 F. 2d 671(C.A. 9), certiorari granted, 409 U.S. 911, argued February 27, 1973, cited by petitioner (Pet. 9), and *United States* v. *McGrath,* 468 F. 2d 1027 (C.A. 7), petition for certiorari pending (No. 72-761), which held that defendants could not be convicted for possession of contraband where the contraband (*McGrath*) or an ingredient essential to its production, and otherwise unobtainable (*Russell*), was supplied by an undercover agent or informant. Accordingly there is no reason to hold this case pending the determination of *Russell* and *McGrath.*

While the recent *per curiam* opinion of the court below in *United States* v. *Knight,* C.A. 9, No. 72-2031, decided October 16, 1972, pending on petition for certiorari (No. 72-965), would seem to go beyond prior cases, and suggest that activity falling short of actually supplying contraband may suffice to give rise to the "new" entrapment defense, here the same court concluded either that the direction and control exercised by law enforcement agents over Bustamante's activities was not as significant as the involvement with the informant in *Knight,*[4] or that in cases where the contraband, or an essential ingredient, does not originate with the government, it must be shown that the

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[4]In *United States* v. *Knight,* which was not cited below by either side or the court of appeals, a government informant acted as a conduit in a "controlled" delivery of heroin to the defendant from an illegal source. But, unlike Bustamante, the informant there acted under the direct control of law enforcement officers and, in fact, had turned the contraband over to them for marking and weighing prior to delivering it to the defendant.

defendant was "induced" to commit the crime by agents of the government. As the court of appeals stated (Pet. App. 2a):

> One who is not induced by government agents to participate in a crime may not rely upon the entrapment defense that might, in appropriate circumstances, be available to a colleague whose participation may have been induced by improper governmental activity. *United States* v. *Sanchez*, 440 F. 2d 649 (9th Cir. 1971). We express no opinion in this case upon the question whether an entrapment defense might have been available to McDaniel. That issue is not before us.

See, also, the earlier decision by the court below in *Greene* v. *United States*, 454 F. 2d 783, upon which petitioner principally relies (Pet. 10), which likewise involved both inducement and threats by an undercover agent.

The affirmance of the judgment of conviction was clearly correct. The decision below does not conflict with holdings of other courts of appeals and does not warrant review.[5]

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[5]Petitioner claims there is a conflict between the circuits on the question whether "creative activity" is a matter for the judge or jury to decide. Whether such a conflict exists is beside the point, since, as we have shown, this is not a case which comes within the ambit of the "new" entrapment defense. In any event, there is no conflict. *United States* v. *Bueno*, 447 F. 2d 903 (C.A. 5), cited by petitioner merely held that, in view of certain uncontradicted but limited testimony, entrapment was established as a matter of law, and therefore remanded the case for another jury trial to permit the government to produce countervailing evidence. Contrary to petitioner's assertions, *Greene* v. *United States*, *supra*, is perfectly consistent with this approach to the respective roles of the judge and jury. *Greene* held that the established facts showed excessive governmental activity as a matter of law. Moreover, both of these cases are in accord with the instant case, in which the court below held that the evidence at trial did not show that petitioner was entrapped, since the alleged improper activity by the informant was not with petitioner, but only with the pilot McDaniel (Pet. App. 2a).

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2. Petitioner also argues that the government failed to make reasonable efforts to produce the informant Bustamante as a witness at trial (Pet. 11). As the court below noted, it is "not plausible that Bustamante's testimony could have helped [petitioner]" (Pet. App. 2a). Petitioner has yet to suggest how Bustamante's testimony could have aided his defense. Nor do the facts suggest that the government intentionally made Bustamante unavailable for trial. Indeed, the record discloses that the government made a reasonable effort to produce Bustamante. On January 4, 1972, the government informed the defense that Bustamante was the informant involved in the case. On January 28, 1972, the defense petitioned the district court for an order requiring that the government produce Bustamante at trial. On January 31, 1972, the government subpoenaed Bustamante and requested that the United States Marshal "use all efforts to see that this witness receives this subpoena" (R. 69-70).[6] At the end of January 1972, Ray Hatch, a United States customs agent, made phone calls to Bustamante's brother and to various Mexican customs agents in an effort to find Bustamante (Tr. 38-41). At the request of the government, Bustamante's name was placed in a computer system at the various border crossings between the United States and Mexico so that if Bustamante tried to enter the United States he would be held for trial (Tr. 44-47). As the district court observed, the government could not force Bustamante, a Mexican citizen, to appear (Tr. 70-71); and under the circumstances the trial judge "fail[ed] to see what else the Government [could] do with respect to Bustamante" (Tr. 69). The court below affirmed this finding (Pet. App. 2a) and it is certainly not "clearly erroneous."

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[6] "R." refers to the record of the clerk in one volume.

3. Petitioner claims that the trial court should have granted immunity to a potential defense witness, Lannie Witt (petitioner's distributor of marijuana) (Pet. 11-12). On the first day of trial the government had offered Witt immunity if he would discuss the case, but Witt refused (Tr. 787-789). During trial petitioner called Witt as a witness, but Witt's attorney advised him to invoke the Fifth Amendment and remain silent (Tr. 782-793). After counsel for petitioner asked the court to grant Witt immunity from prosecution so that he could testify for the defense, the court properly ruled that it had no power to grant immunity on its own motion. *Earl* v. *United States*, 361 F. 2d 531 (C.A. D.C.) (Burger, J.), certiorari denied, 388 U.S. 921; *Ellis* v. *United States*, 416 F. 2d 791 (C.A. D.C.). Petitioner relies on a footnote in *Earl, supra*, suggesting that the problem might be more difficult if the government granted immunity to its own witness while refusing to do so for a defense witness. 361 F. 2d at 534, n. 1. Petitioner argues that the instant case presents such a problem since McDaniel, a government witness, negotiated a plea bargain and thus had the equivalent of immunity. But the record does not indicate that the district judge participated in the plea bargain, or that McDaniel had a promise in advance of his plea that he would be placed on probation. In any event, as the court below stated, "The *Earl* case rejected the argument that a plea of guilty was the equivalent of a grant of immunity, and we agree" (Pet. App. 3a).

4. Petitioner contends that the trial court erred in instructing the jury on reasonable doubt (Pet. 12-13). The instructions, which were reread on request and explained in different terms, were clear and accurate (Tr. 1543-1544, 1587-1588). Petitioner made no objection to the instructions at trial (Tr. 1590-1591), as required by Rule 30, Fed.R.Crim.P., and the court of appeals properly

concluded not only that "alleged errors [were] far from plain," but that "the instructions as a whole fully and fairly explained to the jury the meaning of reasonable doubt" (Pet. App. 3a-4a).

Petitioner's claim here appears to relate principally to the portions of the instructions stating that "reasonable doubt * * * must be such as you would be willing to act upon in the most important and vital matters relating to your own affairs" (Tr. 1543-1566). Although this Court in *Holland* v. *United States*, 348 U.S. 121, indicated a preference for the "hesitate to act" test rather than the "willing to act" test, the phrase used here was not plain error when considered with the instructions as a whole. See *Holland, supra*, 348 U.S. at 140; *United States* v. *Acarino*, 408 F. 2d 512, 517 (C.A. 2); *United States* v. *Cole*, 453 F. 2d 902 (C.A. 8).[7]

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[7] Petitioner also claims that the jury's hopeless confusion was further demonstrated by a note sent to the court during deliberations stating that (Tr. 1593):

> A juror has offered to change his/her decision on one of the Counts, even though he she has stated that he/she believes the opposite way.
>
> This was offered in exchange for an agreement of his/her decision on the other three Counts.

The court then reread certain instructions relating to the jury's duty to deliberate and consult one another (Tr. 1595-1597). Shortly thereafter, the court explained to the jurors that they were not being asked to "find someone guilty just to go home or to agree with other people," and that "each of you has to make up his own mind * * * and not surrender your conviction to the other eleven" (Tr. 1600-1601). (Petitioner did not object to this instruction.) The possibility of confusion was thus eliminated. Nor, as petitioner suggests, were there "inconsistent verdicts" indicating that confusion persisted. See *United States* v. *Manglona*, 414 F. 2d 642 (C.A. 9); *Dunn* v. *United States*, 284 U.S. 390, 394.

5. Petitioner also claims that the trial court improperly refused to admit into evidence the results of a polygraph test which petitioner offered to take in order to corroborate his plea of innocence (Pet. 9). The holding below is concededly in accord with the "unanimous" decisions of the courts of appeals on this issue (Pet. 13)[8] and does not warrant further review. Moreover, petitioner made no effort to establish by expert testimony the probative value of the polygraph tests. This alone would have warranted the denial of his application to admit such evidence. See *United States* v. *Wainwright*, 413 F. 2d 796 (C.A. 10), certiorari denied, 396 U.S. 1009.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

HENRY E. PETERSEN,
Assistant Attorney General.

JEROME M. FEIT,
HARVEY M. STONE,
Attorneys.

MARCH 1973.

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[8] See *e.g.*, *United States* v. *Salazar-Gaeta*, 447 F. 2d 468 (C.A. 9); *United States* v. *Sadrzadeh*, 440 F. 2d 389 (C.A. 9), certiorari denied, 404 U.S. 850; *United States* v. *Parman*, 461 F. 2d 1203 (C.A. D.C.); *Frye* v. *United States*, 293 Fed. 1013 (C.A. D.C.); *United States* v. *Tremont*, 351 F. 2d 144 (C.A. 6); *United States* v. *Rodgers*, 419 F. 2d 1315 (C.A. 10). A single district court decision, *United States* v. *Ridling*, 12 Crim. L. Rptr. 2055 (E.D. Mich.), is the only case petitioner is able to cite for a contrary view. *United States* v. *Zeiger*, 350 F. Supp. 685 (D.D.C.), cited by petitioner, was reversed by the United States Court of Appeals for the District of Columbia Circuit on November 9, 1972 (12 Crim. L. Rptr. 2135).